Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KEVIN SPARKS,

Cross-Petitioner,

vs.

CASH AMERICA INTERNATIONAL, INC., AND CASH AMERICA OF ALABAMA, INC.,

Cross-Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the arbitrary remittitur of the mental anguish component of a compensatory damage award without the enactment of or adherence to procedural guideposts or safeguards violates the Due Process Clause of the Fourteenth Amendment and the right to a trial by a jury under the Seventh Amendment.

2. Whether the trial court abused its discretion by remitting the award of compensatory damages when the verdict was neither flawed nor the result of bias, passion, prejudice, or corruption.

3. Whether the Alabama Supreme Court erred in failing to review the remittitur of the mental anguish component of the compensatory damage award under any standard of review whatsoever.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Kevin Sparks (who may be referred to hereinafter as "Kevin") respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Alabama Supreme Court in *Kevin Sparks v. Cash America International, Inc. et al.*, 2000 WL 1880336 (Ala. Dec. 29, 2000) and the judgment of the trial court which is re-printed in the Appendix to Cash America's Petition for Writ of Certiorari.

OPINIONS BELOW

The Alabama Supreme Court issued the opinion that is the basis of this appeal on December 29, 2000. The opinion is published at 2000 WL 1880336 (Ala. Dec. 29, 2000) and re-printed in the Appendix to Cash America's Petition for Writ of Certiorari. The opinion and order of the Mobile County Circuit Court is unpublished but has been re-printed in the Appendix to Cash America's Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditioned upon this Court's grant of the Petitioner's petition for

writ of certiorari. Cash America's petition for writ of certiorari was docketed on March 30, 2001.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Due Process Clause of the Fourteenth Amendment provides in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law . . . " U.S. Const. amend. XIV.

The Seventh Amendment states, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

STATEMENT OF THE CASE

The Plaintiff, Kevin Sparks, filed the instant lawsuit against Cash American International, Inc., Cash America of Alabama, Inc. (hereinafter "Cash America"), and Bill Ewing, alleging fraudulent misrepresentation, fraudulent suppression, breach of contract and other causes of action on March 3, 1997. At the end of a four day trial the court charged the Jury on breach of contract and fraud, the elements of mental anguish and emotional distress, and punitive damages. (R-894-903). On June 5, 1998, after deliberating for most of the afternoon, the jury returned a verdict in favor of the Plaintiff and against Cash America

in the amount of one million one hundred and fifty thousand dollars ($1,150,000.00). (R-927). The jury assessed compensatory damages at $150,000.00 (which the parties agree included approximately $25,000.00 for actual economic loss and $125,000.00 for mental anguish) and punitive damages in the amount of $1,000,000.00. (R-927).

On June 19, 1998, Cash America filed a Motion for Judgment as a Matter of Law, Or in the Alternative, For a Remittitur or New Trial. (C-885). Cash America asserted that the punitive damage award was excessive and the mental anguish component of the compensatory damage award should be remitted or vacated pursuant to ARCP, Rule 59(f) and pursuant to *Kmart Corporation v. Kyles*, 723 So. 2d 572 (Ala. 1998).

On July 10, 1998, the trial court held a brief hearing on Cash America's motions and on August 7, 1998 the court entered an order remitting the compensatory damage award to $75,000.00 and the punitive damage award to $225,000.00, thereby reducing the total award to $300,000.00 (R-3-43, C-1150). The trial court unconditionally denied Cash America's motion for new trial and for judgment as a matter of law, yet granted the motion for remittitur. The order did not give Kevin Sparks the option of rejecting the remittitur and requesting a new trial as is required under Alabama law and by Rule 59, ARCP. (C-1150). Several other post-trial motions were filed in an effort to urge the trial court to correct its deficient order and both parties eventually filed appeals to the Alabama Supreme Court on procedural and substantive grounds.

On November 27, 2000 the Alabama Supreme Court released a *per curiam* opinion which affirmed the decision of the trial court conditioned upon the trial court granting Kevin the option of requesting a new trial as an alternative to the remittitur. Both parties subsequently filed applications for rehearing and on December 29, 2000 the Alabama Supreme Court withdrew the November 27, 2000 opinion and substituted an opinion which ordered a new trial unless Kevin accepted the remittitur within twenty-eight days, effectively taking the responsibility of correcting the deficient order away from the trial court. The opinion did not address the trial court's remittitur of the mental anguish component of compensatory damages whatsoever.

STATEMENT OF FACTS

This case involves the failure on the part of Cash America to pay Kevin Sparks earned compensation under the terms of a written incentive plan. The evidence at trial established that Cash America fraudulently failed to pay certain management level employees compensation that the company agreed and promised to pay and further fraudulently suppressed the fact that it retroactively terminated the written compensation plan and did not intend to honor its agreement with the employees. Kevin Sparks and many other employees who were not involved in this litigation worked at least nine months under the false impression that the incentive plan was in effect based upon representations made by Cash America. (R-338, 350).

Unbeknownst to Kevin and other eligible employees, the company had no intention of paying the agreed upon compensation. In fact, during 1995 the company was developing a new plan which, in spite of the fact that it resulted in lower incentive payments, Cash America alleged would be "fair". (R-521). At trial the President of Cash America, Dan Feehan, admitted that even though the company had a duty to inform its employees that the company was discontinuing the incentive plan, he "dropped the ball" and failed to inform the employees that he decided to retroactively terminate the plan in the first quarter of 1995. (R-518, 521, 535). Under the new plan that was eventually developed, Cash America retroactively and arbitrarily, without using any guidelines or objective criteria, reduced the amount of Kevin Sparks' incentive compensation by more than $25,000.00. This new plan also had a significant retroactive effect on other management level employees of Cash America, including Bill Trout, Al Harris, Gerry Polito, and Mel Morrow, who testified at trial, and many others who did not. The evidence reflects that approximately sixty-eight (68) employees were adversely affected by the undisclosed termination of the incentive program. (C-961-962, 1030).

Kevin Sparks began working for Cash America in 1987 as a store clerk in Lafayette, Louisiana making four dollars per hour plus commissions. (R-155). Within just a few years of joining the company Cash America promoted Kevin to the position of Area Manager responsible for the profitability of seven large pawn shops in the Tampa, Florida area. (R-160). Throughout Kevin's tenure with the company Cash America promised to reward the excellence of its employees through a program known as

"DARE" (an acronym for Demand and Reward Excellence). The incentive compensation paid by the company, which was closely akin to sales commissions, was an integral part of the compensation packages of all employees, from sales clerks to the highest levels of field management. (R-155-171, Plaintiff's Exhibits 10, 16, and 112).

By 1995 Kevin had risen rapidly through the ranks of Cash America employees and become the youngest and one of the most successful Regional Managers in the company responsible for approximately seventy-five (75) pawn shops located between Northwest Florida and East Texas. In fact at trial Cash America's attorney referred to Kevin as the company's "golden boy" and the President of Cash America, Dan Feehan, testified that Kevin was an "excellent employee." Of course all of this acclaim did not come without great personal sacrifice for Kevin. In the eight years that he was employed with the company he was required to move his family at least five different times and to spend countless hours on the road away from his loved ones only to end up without his "excellence" being rewarded.

When Kevin finally received the incentive portion of his 1995 compensation on December 4, 1995, he was puzzled about the small amount, seven thousand five hundred dollars, ($7,500.00) and concerned because he had worked hard all year in anticipation of being paid pursuant to the written incentive plan under which he was supposed to be paid at least thirty two thousand five hundred dollars ($32,500.00). After Kevin received the reduced incentive payment he immediately called his supervisor, Bill Ewing, and told him that there must have

been a mistake. (R-214). At trial Kevin testified that he was "shook up" and trembling that day. *Id.* Kevin further testified that he could not believe that Cash America "turned their back on me like that" and he could not continue to work that day. After Kevin got home it "felt like somebody had cut [his] arms and legs off." *Id.* Kevin related that he shook and trembled, and simply laid on the couch from that point on. (R-214). According to Kevin and to medical records which were admitted at trial, he went to the Emergency Room at Thomas Hospital approximately two days later (December 6, 1995), complaining of chest pain and "feeling bad". (R-215). The Thomas Hospital records indicate that there was an onset of chest pain while at work, numbness in the left side of his body, and increased anxiety and insomnia due to work stress. (Plaintiff's Trial Exhibit 121).

On December 8, 1995, Kevin saw Dr. William Sullivan who diagnosed him as having, among other things, "situational factors with anxiety, possible depression" and "having significant tremulousness over the stress of work." Dr. Sullivan suggested setting up a psychiatric evaluation for Kevin. (Deposition of Dr. Sullivan, page 17). Dr. Sullivan's testimony specifically revealed that he believed the stress and anxiety that Kevin was experiencing was directly related to his situation at work. Dr. Sullivan testified as follows:

> Q Did you make a medical diagnosis of Mr. Sparks' condition on December 8th?
>
> A Well, at that time when he left, we said that he probably – I said possible hypertension. I mean his blood pressure was elevated, so we said he had hypertension. Then I wrote

down situational factors with anxiety, and then after that I wrote possible depression.

Q Could you explain to me what you mean by situational factors with anxiety and possible depression?

A Well, I mean Mr. Sparks, you know, stated to me when he came in that just there was a lot going on with primarily his workplace and that that was a source of stress in that it was interfering, I believe, both with – he was almost – he noted that from time to time had some episodes of tearfulness, that he was aware of his heart skipping and beating. And we thought that those may be indications of physical signs of anxiety or stress. (Deposition of Dr. William Sullivan, page 15-16).

Kevin followed up with Dr. Sullivan, who indicated that Kevin continued to have episodes of tearfulness and sleeplessness for several months. (R-217). Dr. Sullivan prescribed medication for anxiety, stress, and high blood pressure. (R-217). Dr. Sullivan's videotaped deposition was played to the jury in it's entirety without objection, all of the Thomas Hospital emergency room records and Dr. Sullivan's medical records were admitted at trial, and Cash America's pre-trial motion *in limine* to exclude the testimony was voluntarily withdrawn presumably for tactical reasons. (R-8-9).

In support of his claim for mental anguish Kevin also testified that the whole ordeal was "an emotional roller-coaster" and that he went through some "ups and downs" because he "didn't know exactly what they were doing." (R-332). There was also testimony from other

Cash America employees who indicated the company was aware of Kevin's problems and concerns over the incentive. (R-529, 746).

On the same day that Kevin was in the Emergency Room at Thomas Hospital and therefore not at work, his supervisor, Bill Ewing, had a conversation with another employee about demoting him and taking over many of his responsibilities. On December 8, 1995, while Kevin was at Dr. Sullivan's office, Bill Ewing, with the knowledge of the Vice-President of Human Resources, Rob Brockman, turned off Kevin's pager service, canceled his American Express card, arranged for his health insurance benefits to be terminated, and changed the locks on the store where Kevin's office was located. (R-761-762). Despite the fact that Kevin was constructively terminated, stripped of all benefits, and effectively barred from returning to work on December 8, 1995, Cash America claims that it terminated him on January 2, 1996.

Kevin eventually filed the instant lawsuit alleging, among other things, that Cash America failed to disclose the fact that it terminated the 1995 incentive compensation plan and made material misrepresentations concerning the plan. Kevin sought damages for the non-payment of the incentive as well as compensatory damages for mental anguish and punitive damages. After a four day trial the jury awarded Kevin $150,000.00 in compensatory damages ($125,000.00 of which the parties agree is for mental anguish and emotional harm) and $1,000,000.00 in punitive damages. After a post-trial hearing conducted pursuant to the *BMW v. Gore* case, the trial court reduced the amount of the compensatory damage award to $75,000.00 ($50,000.00 of which represents mental

anguish) and reduced the punitive damage award to $225,000.00 for a total award of $300,000.00. The trial court did not give Kevin the option of requesting a new trial as an alternative to accepting the remittitur in its original order.

Both parties appealed and the Alabama Supreme Court issued an opinion, which largely addresses the post-trial procedural snarl, on December 29, 2000. The Alabama Supreme Court did not review the remittitur of the mental anguish award thus completely side-stepping a major issue raised by both parties on appeal. Although the December 29, 2000 opinion does indicate that the award of punitive damages is supported by clear and convincing evidence, it is utterly silent on the trial court's reduction of the mental anguish portion of the compensatory damage award. In fact even though Cash America did not raise the issues which it now raises before this Court in its Application for Rehearing to the Alabama Supreme Court, it did address the mental anguish issue because it was glaringly absent from the December 29, 2000 opinion. To this day no appeals court has ever reviewed or scrutinized the reduction of the mental anguish component of the compensatory damage award from $125,000.00 to $50,000.00.

REASONS FOR GRANTING THE WRIT

Cash America has filed a petition for writ of certiorari requesting that this Honorable Court consider this case due to the Alabama Supreme Court's failure to review an award of punitive damages for excessiveness.

While Kevin Sparks does not concede that the Alabama Supreme Court did not review the punitive damage award at all, he does admit that the court appeared to rely upon the trial court's detailed seventeen-page order which addressed each and every one of the "guideposts" outlined in this Court's *BMW v. Gore* opinion in affirming the award. However, what is most troubling about the December 29, 2000 *per curiam* opinion that the court took almost two years to render is that is does not address the trial court's remittitur of the mental anguish component of the compensatory damage award in any way whatsoever. In the wake of recent confusion in Alabama surrounding the question of what is the appropriate method to review an award of mental anguish damages, the Alabama Supreme Court completely disregarded the arguments of the parties concerning the mental anguish award and side-stepped the issue completely. In doing so the Alabama Supreme Court stripped the original mental anguish verdict of its constitutional protection without applying any procedural safeguards or guideposts. The remittitur of the mental anguish portion of the original jury verdict by the trial court and the failure of the Alabama Supreme Court to review the remittitur has resulted in the denial of Kevin Sparks' right to due process and his right to have this controversy decided by a jury.

I. THE ALABAMA SUPREME COURT ERRED IN FAILING TO REVIEW THE REMITTITUR OF THE MENTAL ANGUISH COMPONENT OF THE COMPENSATORY DAMAGE AWARD UNDER ANY STANDARD OF REVIEW WHATSOEVER.

Remittitur practice in Alabama has evolved over the years into what practitioners recognize as the *Hammond/Green Oil* framework which has, with the aid of the United States Supreme Court, developed further into the "*BMW*" analysis of the excessiveness of damages. *BMW of North America, Inc. v. Gore,* 116 S. Ct. 1589 (1996); *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989). The *Hammond/Green Oil/BMW* framework gives plaintiffs, defendants, lawyers and judges guidelines to follow in considering whether an award of **punitive** damages is excessive. By being guaranteed that courts will consider the degree of reprehensibility of the defendant's conduct, the ratio of compensatory damages to punitive damages, and other "guideposts" that courts have enumerated over the years, Alabama defendants are assured due process. However, Alabama presently has no "guideposts" to follow in reviewing an award of **compensatory damages** for excessiveness other than; (1) whether the award is totally unsupported by the evidence, or (2) whether the award is the result of bias, passion, prejudice, or other corruption. *Pitt v. Century II, Inc.,* 631 So. 2d 235 (Ala. 1993); *citing Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986).

The Alabama Supreme Court has held that if an award of compensatory damages is flawed in one of the above two respects it loses its constitutional protection. However, the common law gives little guidance in terms

of what factors or "guideposts" should be considered in order to make this determination. Since the compensatory damage award assessed by a jury should be viewed in a light most favorable to the plaintiff, it makes sense that any review of such award should also focus on the plaintiff's rights. *Duck Head Apparel Company v. Hoots*, 659 So. 2d 897 (Ala. 1995). In the *Duck Head* case the Supreme Court of Alabama stated as follows:

> When assessing the question of excessiveness of compensatory damages, the focus is on the *plaintiff* as stated in *Pitt v. Century II, Inc.*, 631 So. 2d 235 (Ala. 1993).
>
> A court reviewing a verdict for compensatory damages must determine what amount a jury, in its discretion, may award, viewing the evidence from the plaintiff's perspective. *Bridges v. Clements*, 580 So. 2d 1346 (Ala. 1991).

In the present case, it is clear that the trial court failed to properly focus on the Plaintiff, but rather arbitrarily reduced the compensatory damage award after a post-trial hearing which focused primarily on punitive damages.

Currently, no framework to insure that a plaintiff's constitutional rights to due process and trial by jury are not abridged exists in the same manner that a *BMW* analysis protects the due process rights of defendants in punitive damage cases. In his dissent in *Wyser v. Ray Sumlin Construction Company, Inc.*, 680 So. 2d 235 (Ala. 1996), former Alabama Supreme Court Justice Hugh Maddox detailed the recent history of remittitur practice in Alabama beginning with *General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985) and called for the

court to remand the case so that the rationale of the trial court could be made a part of the record. Justice Maddox was prophetic in calling for "specific standards for courts to apply in granting or denying remittitur" in that this Honorable Court enunciated standards applicable to punitive awards less than one month later in *BMW v. Gore*, 116 S. Ct. 1589 (1996). However, the court's call for "specific standards" in the *G.M.* case and Justice Maddox's identification of the need for those standards in *Wyser* remain problematic in that *Wyser* deals solely with an award of compensatory damages and not punitive damages.

Although the United States Supreme Court answered Alabama's call for "specific standards" with regard to punitive damages by refining the *Hammond/Green Oil* analysis in *BMW v. Gore*, there are still no such standards to "ensure the protection of the jury system and the parties' right to a jury trial" with regard to awards of compensatory damages. *Wyser quoting G.M.* It is clear that in *G.M.* and *Wyser* the Alabama Supreme Court and Justice Maddox, respectively, contemplated situations in which the remittitur of compensatory damage awards could deprive plaintiffs of their due process right and of their right to a trial by jury if certain "rules of practice were not adopted." *Id.* In fact, in *Wyser*, which deals solely with an award of compensatory and not punitive damages, Justice Gorman Houston emphasizes the significance of an award of compensatory damages by vowing to "go to the mat to uphold a jury's compensatory damages award, if there is no reversible error." *Wyser*. As such, in reviewing an award of compensatory damages for excessiveness, plaintiffs should be entitled to the same

level of protection, if not more, than a defendant receives in a punitive damage analysis. To provide otherwise is to deny a plaintiff a right to due process and a right to trial by jury.

In his dissent in *McCann v. Lee*, 679 So. 2d 658 (Ala. 1996), former Alabama Supreme Court Chief Justice Hooper also advocated a change in the current system of evaluating compensatory damage awards. In that case, Chief Justice Hooper suggested that the court abandon the *Skipper* rational and adopt a review that focuses on a "common law" and "common sense" analysis of jury awards in which awards are compared to common law cases which have come before. *W. S. Fowler Rental Equipment Co. v. Skipper*, 276 Ala. 593, 165 So. 2d 375 (1963). In *Skipper* the Alabama Supreme Court held:

> There is no yardstick by which compensatory damages for pain and mental suffering can be measured, and the ascertainment of the amount the plaintiff was due as compensation for these elements of damage must of necessity be left to the sound discretion of the jury, subject only to correction by the court for clear abuse or passionate exercise. *McCann v. Lee*, 679 So. 2d 658 (Ala. 1996); *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So. 2d 812, 820 (Ala. 1988); *quoting W. S. Fowler Rental Equipment Co. v. Skipper*, 276 Ala. 593, 603, 165 So. 2d 375 (1963).

The Chief Justice's dissent in *McCann v. Lee* no doubt flows from a recognition that remittitur of compensatory damage awards must be closely scrutinized. *McCann*. If Alabama were to adopt a "common law" and "common sense" approach to the review of mental anguish awards, the instant case would not be out of line with recent mental anguish awards, especially in light of the medical

testimony and evidence in the present case. *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897 (Ala. 1995) (the court upheld a $2,000,000.00 award for purely economic harm with no medical evidence of mental anguish); *Spereau v. Ford Motor Company*, 674 So. 2d 24 (Ala. 1995) (upholding a $500,000.00 award of damages for emotional and mental anguish to owner of failed Ford dealership); *Talent Tree Personnel Services v. Fleenor*, 703 So. 2d 917 (Ala. 1997) (affirming a $300,000.00 compensatory damage award for mental anguish over lost incentive compensation like that in the present case).

However, in 1998 the Alabama Supreme Court decided *Kmart v. Kyles*, which has only served to muddy the compensatory damage waters thereby creating even greater difficulty for the bench and bar in determining what is and what is not an acceptable compensatory damage award. *Kmart v. Kyles*, 723 So. 2d 572 (Ala. 1998).

The *Kmart* case presented the question of whether "indirect evidence of mental anguish alone [is] sufficient to support a substantial verdict." The Alabama Supreme Court answered that question in the negative. *Id.* Therefore, the precedential value of the *Kmart* case should be limited to cases in which there is no direct evidence [i.e., the plaintiff does not testify] of mental anguish. In *Kmart* the Alabama Supreme Court cited the fact again and again that the plaintiff made a calculated decision not to testify about her mental anguish.

Since *Kmart* was released in 1998 the Alabama Supreme Court has used the precedent to engage in the wholesale reduction of mental anguish awards, even where there is direct evidence of mental anguish.

Delchamps, Inc. v. James Sterling Bryant, 738 So. 2d 824 (Ala. 1999); *Beatrice E. Oliver v. Patricia Towns*, No. 1982303 (Ala. 3/10/2000). The application of the *Kmart* rational to cases in which plaintiffs testify about their own mental anguish has resulted in judicial legislation opening the doors to a re-weighing of the evidence of mental anguish by Alabama appeals courts which is a process that should be left to the sound discretion of Alabama juries.

In his scathing dissent in *Delchamps, Inc. v. James Sterling Bryant*, 738 So. 2d 824 (Ala. 1999) Justice Douglas Johnstone criticized the precedent set in *Kmart* as follows:

> . . . I dissent from the holding that the plaintiff's award should be reduced pursuant to the new rule promulgated by *Kmart Corp. v. Kyles*, 723 So. 2d 572 (Ala. 1998), to the practical effect that the Court will invoke an absence or a paucity of direct evidence of mental suffering as a reason for reducing a jury award for mental suffering, notwithstanding the indirect, objective evidence that persuaded the fact finder to assess the award in the first place. In *Kmart* this Court performed some judicial legislating; and, in the case at issue, the Court dignifies that judicial legislation as judicial precedent.
>
> Specifically, in *Kmart*, this Court created the requirement that a plaintiff introduce direct evidence of his or her mental suffering in order to avoid the "stricter scrutiny" that the Court announced it would impose on mental suffering verdicts based only on indirect, albeit objective and reliable, evidence, such as the acts committed against, or tangible losses suffered by, the plaintiff. The logical (but bad) extension of this

new requirement would be that plaintiffs seeking compensation for physical pain resulting from even the most horrible acts and injuries will need to emote pathetically to the finder of fact in order to avoid the "stricter scrutiny."

. . .

The *Kmart* rationale is defective in several ways. First, the over-fifty-year-old change in the rules of evidence is hardly a feature that distinguishes *Kmart* from the countless intervening cases of mental suffering.

Second, the new *Kmart* burden contravenes the fundamental purpose of the rules of evidence: to promote the most reliable forms of proof. Rarely does our law presume to dictate to parties the types of admissible evidence they must introduce or combine to prove a fact. In those rare instances where the law does require corroboration, the purpose of the law is to buttress some inherently suspect form of evidence, such as the testimony of a criminal accomplice against a defendant in a criminal prosecution, or testimony by someone that he or she is the agent of another for purposes of binding that other. The new *Kmart* rule does just the opposite: it requires the least reliable of all forms of evidence – subjective, self-serving emoting – ostensibly to buttress the most reliable form of evidence of mental suffering – the objective facts of the acts committed against, and the tangible losses suffered by, the plaintiff.

The third defect in the new *Kmart* rule is that it often will confront the plaintiff with the dilemma of losing either way the plaintiff presents his or her case. Many jurors are repelled by a plaintiff's testimony of his or her own

suffering. Yet *Kmart* requires the plaintiff to antagonize these jurors in order to satisfy the Court!

The fourth defect in the *Kmart* rule, at least as applied in the main opinion in the case at issue, is that it invites testimony by "a professional," as an option for direct evidence to corroborate mental suffering. On the one hand, such evidence is admissible. On the other hand, of all the subjects within the ken of the typical jury and therefore without the need for expert testimony, the mental anguish attendant to a false accusation would seem to be the foremost. This country is now crawling with "experts" with more credentials than integrity. We need to avoid unnecessarily inviting an increase in demand for these people.

The fifth defect in the new *Kmart* rule is that it does not put the Court one iota closer to a fair way of judging whether mental suffering awards are excessive or not. The case at issue is a prime example. This plaintiff introduced enough evidence (to some extent minimized in the main opinion), mostly indirect and objective, but some direct, to persuade the jury to award $399,300 for mental suffering. This Court is ordering a remittitur. Suppose, now, that the plaintiff had submitted to the new rule (not then in effect) and had testified as follows:

> "Oh, it was the most horrible experience of my life. I cried and cried and wrung my hands until my bones were sore. I had a knot in my stomach and a splitting headache and I didn't sleep a wink for two months, all because of what Delchamps did to me."

> Would this testimony have deterred the Court from remitting the verdict? If so, would the new rule have promoted justice? If we would have remitted the verdict anyway, would we have been honoring the new rule? Remotely possibly, we might have agreed on less of a remittitur simply because of the additional evidence, but not because the direct evidence would have given us greater insight to the truth than a like quantity of additional indirect, objective evidence. Our more likely reaction, however, would have been to conclude, as the jury probably would have concluded under this scenario, that the plaintiff was either a liar or a sissy or both, who deserved little award if any at all. Because the new rule will serve no legitimate purpose and will cause so much trouble, *Kmart* should be overruled. The question remains, however, what is a legitimate way to review mental anguish verdicts for excessiveness? . . .

Delchamps, Inc. v. James Sterling Bryant, 738 So. 2d 824 (Ala. 1999). In addition to the many concerns that Alabama Supreme Court Justice Johnstone raises over the current state of mental anguish law since *Kmart*, Justices Kennedy and Cook both wrote separate dissents in *Delchamps v. Bryant* arguing that the *Kmart* holding has been inappropriately extended to include fact situations where there is direct evidence of mental anguish. Justice Cook fears that the court is now "elevating form over substance, that is focusing on the type of evidence presented, to the diminishment of focusing on the nature and degree of mental anguish suffered." *Delchamps*, 738 So. 2d 824 (Ala. 1999).

The practice in Alabama prior to *Kmart* had been that an award of compensatory damages (including damages for mental anguish) is left to the sound discretion of the jury. *W. S. Fowler Rental Equipment Co. v. Skipper*, 276 Ala. 593, 603, 165 So. 2d 375 (1963). Since a verdict is presumed to be correct, it will stand unless a showing is made that; (1) the damages are not recoverable as a matter of law or are totally unsupported by the evidence where there is an exact standard or rule of law that make the damages legally and mathematically ascertainable at a precise figure; or (2) a verdict is the result of bias, passion, prejudice, corruption, or other improper motive. *Pitt v. Century II, Inc.*, 631 So. 2d 235 (Ala. 1993); *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). In the instant case, Cash America made no showing whatsoever that the compensatory damage award was the result of any of these factors and the Alabama Supreme Court did not review the remittitur under any guise at all. Even if Cash America had made such a showing, neither the trial courts nor the appeals courts have adopted any analytical framework to apply in determining the appropriate measure of mental anguish damages.

II. THE TRIAL COURT ABUSED ITS DISCRETION THEREBY DEPRIVING KEVIN SPARKS IMPORTANT CONSTITUTIONAL RIGHTS BY REMITTING THE AWARD OF COMPENSATORY DAMAGES WITHOUT THE APPLICATION OF ANY PROCEDURAL SAFEGUARDS OR GUIDEPOSTS WHEN THE VERDICT WAS NEITHER FLAWED NOR THE RESULT OF BIAS, PASSION, PREJUDICE, OR CORRUPTION.

The jury in the instant case awarded Kevin $150,000.00 in compensatory damages. (R-927). At least

$25,000.00 of the $150,000.00 represented actual economic loss suffered by Kevin Sparks. As noted in the Statement of Facts above, Kevin presented substantial direct and indirect evidence of the mental anguish he suffered including competent medical evidence.

The right to a trial by jury is a fundamental, constitutionally guaranteed right. U.S. Const. amend. VII; Article I, § 11, Constitution of the State of Alabama (1901). In Alabama a jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection. *Pitt v. Century II, Inc.*, 631 So. 2d 235 (Ala. 1993); *citing Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). According to *Hammond v. City of Gadsden*, and the cases that have followed, "insofar as damages are concerned, a jury verdict may be flawed in two ways" which include:

> First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. . . . Second, a jury verdict may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive. *Pitt v. Century II, Inc.*, 631 So. 2d 235 (Ala. 1993); *quoting Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).

In the present case there is no question that mental anguish damages are legally recoverable.

Although the trial court did allege that "the award of compensatory damages in this case is excessive," the

mere fact that the court believes that an award of compensatory damages overcompensates a plaintiff for his injuries is not sufficient grounds to reduce the award. (Pet. App. 3a, C-1174); *Pitt v. Century II, Inc.*, 631 So. 2d 235 (Ala. 1993); *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667 (Ala. 1979); *Central of Georgia Railway Co. v. Steed*, 287 Ala. 64, 248 So. 2d 110 (1971); *Vest v. Gay*, Ala. 286, 154 So. 2d 297 (1963). It is clear from the transcript of the post trial hearing that the trial court considered Cash America's argument that Kevin was overcompensated and based its decision to remit the compensatory damages largely upon that premise. In discussing the argument that Cash America made concerning the jury's mental anguish award, the trial court stated, "let's focus on basically they're [Cash America is] saying that your guy [Kevin Sparks] got too much money." (R-26, transcript of post-trial hearing). The fact that Cash America argued, and the trial court apparently agreed, that the jury awarded Kevin too much money is not proper grounds to strip the award of compensatory damages of its constitutional protection. Furthermore, the Alabama Supreme Court has consistently held that "the trial judge may not substitute his personal preference for the judgment of the jury." *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667 (Ala. 1979); *citing Holcombe v. Whitaker*, 294 Ala. 430, 318 So. 2d 289 (1975).

The trial court erred when it concluded that "[t]he nexus between the allegations and proof of mental anguish is tenuous." (R-1175). Aside from substituting its judgment for that of the jury, the trial court misapplied the law in remitting the compensatory award based upon what it termed "tenuous" proof of mental anguish. It is the function of the jury, not the court, to weigh the

evidence. *Franklin v. State*, 405 So. 2d 963, 964 (Ala. Cr. App.), cert. denied, 405 So. 2d 966 (Ala. 1981); *Crumpton v. State*, 402 So. 2d 1081, 1085 (Ala. Cr. App.) cert. denied, 402 So. 2d 1088 (Ala. 1981). The credibility of witnesses and the weight or probative force of testimony is for the jury to judge and determine. *Harris v. State*, 513 So. 2d 79, 81 (Ala. Cr. App. 1987) *quoting Byrd v. State*, 24 Ala. App. 451, 136 So. 2d 431 (1931). In considering the evidence of mental anguish that Kevin presented at trial, the trial court wrote:

> With regard to the Plaintiff's testimony, he could only say that the Defendants' conduct made him feel "as if his arms and legs had been cut off and all he could do was lie on the couch." The Plaintiff then **attempts to give his subjective symptoms a ring of truth by connecting them to the expert testimony** of Dr. Sullivan, who treated the Plaintiff from December 8, 1995 to April 12, 1996. Dr. Sullivan treated the Plaintiff, shortly after he received the bonus check, for stress-related anxiety, a sleep disorder, and high blood pressure. Dr. Sullivan saw the Plaintiff several times over a matter of months and attributed the symptoms to work-related factors based on a medical history given by the Plaintiff. [emphasis added].

It is evident that based upon the comments highlighted above, the trial court crossed the line from gatekeeper of evidence to trier of fact. Whether a nexus exists or is sufficient enough to connect Kevin's testimony with that of Dr. Sullivan is a question of fact to be determined by the jury, not the trial court. It is clearly the function of the jury to decide whether or not Kevin's symptoms had a

"ring of truth" and not within the discretion of the court to weigh this evidence.

Furthermore, after hearing the same evidence that the jury heard during the four day trial, the trial court, without objection from Cash America, instructed the jury as follows:

> I charge you that there is no fixed standard for determining the amount of compensatory damage you may award for mental anguish you may award in this case. If you find that the Plaintiff has suffered mental anguish as a result of the actions of one or more of the Defendants you may award any amount that you feel is appropriate to compensate the Plaintiff for his mental anguish and suffering. (R-899).

The fact that the trial court charged the jury on mental anguish damages at all, without objection, demonstrates that Kevin presented sufficient evidence of mental anguish to make it a question for the jury. The trial court has denied Kevin's right to due process under the Fourteenth Amendment and denied his right to have his case decided by jury under the Seventh Amendment by taking the question of the weight of the evidence relating to mental anguish away from the jury after it had already rendered a verdict for $150,000.00 in compensatory damages. U.S. Const. amend. XIV; U.S. Const. amend. VII; Article I, § 11 of the Constitution of the State of Alabama (1901). The original jury verdict should be reinstated and the punitive damage award should be adjusted upward proportionately to reflect the three to one ratio that the trial court determined would be appropriate.

CONCLUSION

In the event that this Court grants Cash America's petition for writ of certiorari it should also grant Kevin Sparks' conditional cross-petition for certiorari in order to establish "guideposts" for the review of the mental anguish awards and insure that Kevin Sparks and future plaintiffs are not denied important Constitutional rights.

Respectfully submitted,

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